Office-Supreme Court, U.S.
FILED
FEB 22 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1026

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARINE MIDLAND BANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the Court of Claims[1] erred in holding that the title vesting clauses in three government contracts with an insolvent debtor took priority over petitioner's floating lien on the debtor's property.

1. In 1977, Bond Trailer Division, Inc. ("Bond"), a government defense contractor, guaranteed to petitioner the payment of a certain indebtedness of a third party and secured this guaranty through a floating lien on all of Bond's machinery and inventory. Bond was exclusively a government contractor (Pet. App. 2) and entered into three

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[1]The decision below was rendered on August 25, 1982, prior to the effective date of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, which abolished the Court of Claims and transferred its appellate functions to the new United States Court of Appeals for the Federal Circuit.

munitions contracts with the government in 1976 and 1978. As a condition of the government's progress payments to Bond during production, each contract contained a clause vesting in the United States title to all inventory and work in progress "allocated or properly chargeable" to that contract (*ibid.*).

Upon Bond's default under its guaranty, petitioner sued in the state courts of Virginia to obtain possession of the collateral. The United States intervened in that proceeding, asserting its ownership of the property, and removed the case to the United States District Court for the Western District of Virginia. Following Bond's subsequent bankruptcy petition, the bankruptcy court abandoned all interest in the collateral under an agreement that the government would take possession of the collateral subject to petitioner's claim for $250,000 should a court later determine that petitioner's security interest was paramount to the interest asserted by the government. The district court then transferred the case to the Court of Claims (Pet. App. 3). On the parties' cross-motions for summary judgment, the Court of Claims dismissed petitioner's complaint on the ground that it was due no compensation under the Fifth Amendment for a taking of its alleged interest in the contested property.

2. The Court of Claims correctly recognized the superiority of the government's claim, as created by federal law, and emphasized the existence of a unique federal interest that is not subject to state recording statutes.[2] The court

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[2]In reaching this result, the Court of Claims characterized the government's interest in the property as a lien rather than as title. An analysis more in keeping with established precedent would have recognized the government's interest as one of title over the property. In 10 U.S.C. 2307, Congress expressly empowered the Department of Defense to employ a progress payment system. Congress also directed (10 U.S.C. 2202) the agency to implement such a system in accordance with regulations promulgated by the Secretary. In carrying out this

further concluded that its holding merely followed the modern practice of giving priority to purchase money security interests, which it considered to be closely analogous to the interest created by the government's progress payment system (Pet. App. 15). This decision does not conflict with the holding of any other court and does not warrant further review.

a. Petitioner argues (Pet. 10-11) that the decision below is inconsistent with *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979). There, the Court held that, absent a congressional directive, the relative priority of private liens and consensual liens arising from certain social welfare lending programs was to be determined under nondiscriminatory state law. *Id.* at 740. In analyzing whether to adopt state law as the basis for decision, or to fashion a nationwide federal rule, *Kimbell Foods* set forth three criteria: (1) whether the nature of the federal program involved requires that it be uniform in character throughout the nation, (2) whether the application of state law would frustrate a specific objective of the federal program, and (3) whether the application of a federal rule would disrupt relationships predicated on state law. *Id.* at 728-729.

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charge, the Secretary issued regulations requiring that all contracts using the progress payment system contain a provision vesting title in the United States for all goods purchased for the production requirements of the contract. For more than 70 years the courts have consistently given title vesting provisions in government contracts their intended effect. See, *e.g.*, *Armstrong* v. *United States*, 364 U.S. 40 (1960); *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452 (1910); *United States* v. *Digital Products Co.*, 624 F.2d 690 (5th Cir. 1980); *In re Double H Products Corp.*, 462 F.2d 52 (3d Cir. 1972); *Boeing Co.* v. *United States*, 338 F.2d 342 (Ct. Cl. 1964), cert. denied, 380 U.S. 972 (1965); *J.F. Hodgkins Co.* v. *United States*, 318 F.2d 932 (Ct. Cl. 1963); *Shephard Engineering Co.* v. *United States*, 287 F.2d 737 (8th Cir.), rehearing denied, 289 F.2d 681 (1961).

The Court of Claims viewed this case under the *Kimbell Foods* standards and correctly concluded (Pet. App. 15) that "resort to state laws would not be appropriate in this case, as contrary to evident congressional intent and established federal practice." Moreover, the court below specifically recognized the necessity for a uniform rule of decision with respect to procurement contracts (*ibid.*). Thus, the court correctly found that the government's interest in the collateral was not subject to state recording statutes. The court further observed that general creditors would not be harmed by this rule, particularly pre-existing creditors who would retain their liens on property owned by the debtor when the loan was made but not on after-acquired property underwritten by the government (*ibid.*).

b. Petitioner also contends (Pet. 11) that the Court of Claims reached a result inconsistent with the Tenth Circuit's decision in *In re Murdock Machinery & Engineering Co.*, 620 F.2d 767 (1980). But, as the Court of Claims stated, *Murdock* is distinguishable (Pet. App. 12-13). *Murdock* arose from the attempt of a government contractor's supplier to halt delivery of goods still in transit. Not only did that case not involve a dispute between the government and a floating lien creditor,[3] but no argument was presented to the Tenth Circuit that procurement programs demanded a uniform commercial law (Pet. App. 12-13 n.8). More fundamentally, the Court of Claims reasoned that federal common law did not require the title vesting clause to fit into a state recording system of which it was never intended to be a part (*id.* at 13).

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[3]As the Court of Claims noted (Pet. App. 12 n.8), "[o]ur case * * * does not involve a mere supplier, who may well only deal with a government contractor as one of many identical orders received on any given day. We are dealing with a lender, part of whose job is to become familiar with a prospective debtor's operations. The burden on suppliers that the Tenth Circuit found so important is not a burden on lenders * * *."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1983

DOJ-1983-02